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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1589

GENERAL ELECTRIC COMPANY,

Petitioner,

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL.,

No. 74-1590

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, ET AL.,

Petitioners,

v.

GENERAL ELECTRIC COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF CELANESE CORPORATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF

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MOTION OF CELANESE CORPORATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Celanese Corporation ("Celanese") respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the petitioner herein has been obtained, but the attorney for the respondent herein has refused to consent to the filing of the brief.

Celanese has an interest in this case because it is the defendant in two actions pending in United States District Courts which will be directly affected by the Court's decision in this case. *Odom* v. *Celanese Domestic Fibers Group,* Civil Action No. C-C-74-41, is a class action pending in the Western District of North Carolina, Charlotte Division. *Hull* v. *Celanese Corporation, et al.,* Civil Action No. 73 Civ. 3725 (R. O.) is pending in the Southern District of New York. In both actions plaintiff claims that Celanese's basic hospitalization, long-term disability and sick-leave program violates Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e, *et seq.*)

In its *amicus curiae* brief Celanese seeks to bring to the attention of the Court certain facts which are not found in petitioner's brief. Those facts pertain to Celanese's experience in the operation of its aforementioned plan with respect to the employees in its Charlotte facilities.

The facts show that total medical costs on a per employee basis were substantially higher for females than for males. Of possible greater importance, however, Celanese has determined the cost per employee for treatment of conditions which are peculiar to one sex, e.g., tubal ligations, abortions and hysterectomies for women, and vasectomies and prostate treatment for men. The costs per employee for such sex-oriented medical treatments were forty-two times greater per female employee than per male employee.

Celanese believes that facts such as these are plainly relevant to the disposition of this case in that they demonstrate an absence of sex discrimination under the rationale of *Geduldig* v. *Aiello,* 417 U. S. 484 (1974). Where substantially higher medical payments are made per employee to women than to men, and where payments for treatment for purely female medical conditions are substantially higher per employee than payments for treatment of purely

male medical conditions, it cannot be sex discrimination for an employer, acting solely for economic reasons, to limit payments for maternity. This is especially true in light of the high costs of maternity benefits and the other factors relating to the problem, such as the number of female employees who do not return to their jobs following the birth of a child, which are set forth in petitioner's brief.

Celanese respectfully requests that its motion for leave to file a brief *amicus curiae* be granted.

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BRIEF OF CELANESE CORPORATION AS *AMICUS CURIAE*, IN SUPPORT OF PETITIONER

Interest of The *Amicus Curiae*

Celanese Corporation (Celanese) is a corporation, transacting business in a number of states, including North Carolina and New York. It employs more than 6,000 females in its operations.

Celanese is the defendant in two actions pending in United States District Courts which will be directly affected by the Court's decision in this case. *Odom* v. *Celanese Domestic Fibers Group,* Civil Action No. C-C-74-41, is a class action, pending in the Western District of North Carolina, Charlotte Division. *Hull* v. *Celanese Corporation, et al.,* Civil Action No. 73 Civ. 3725 (RO), is pending in the Southern District of New York. Plaintiff in both actions alleges that Celanese's basic hospitalization, long-term disability, and sick-leave program violates Title VII of the 1964 Civil Rights Act (42 U. S. C. § 2000e, *et seq.*).

Accordingly, Celanese has a proper interest in the resolution of the issues before the Court in this case.

ARGUMENT

Petitioner's Plan Must Be Found To Be Not Discriminatory under the Standard as Formulated in *Geduldig* v. *Aiello*

This Court has already formulated the constitutional meaning of "sex discrimination" in *Geduldig* v. *Aiello,* 417 U. S. 484 (1974). That case held that an income protection program which excluded pregnancy from its list of compensable disabilities does not involve "discrimination based upon gender as such" and does not violate the Constitution. *Geduldig* v. *Aiello,* supra, at 496-97, n. 20. Since the plan now being reviewed by this Court is similar in all material respects to the plan in *Aiello,* Petitioner's plan clearly does not violate Title VII of the Civil Rights Act.

"The objective of Congress in the enactment of Title VII . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of [male] employees over [female] employees." *Griggs* v. *Duke Power Co.,* 401

U. S. 424, 429-30 (1971). The Act outlaws employment practices which express an employer's stereotypical beliefs concerning the sex of its employees. The employer can no longer prefer to recruit, hire, fire, place, or promote an employee solely because of the employee's sex.

That type of employer action is not present in this case. "There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." *Geduldig* v. *Aiello,* supra, at 496-97. The purpose of the Act is to equalize opportunity, not establish advantages for either men or women. If the decision below is affirmed, an advantage not contemplated by Congress would be created; pregnant women would be improperly afforded preferential treatment.

The experience of the operation of the Celanese plan, as illumined by the affidavit of R. G. Wells, submitted in *Odom* v. *Celanese,* supra, illustrates the point.[1] That affidavit establishes that females, as compared to males, are afforded preferential treatment in payments for medical claims, as follows:

> An analysis was made of all claims filed by, and paid to, Celanese's Charlotte facilities male and female employees, both active and inactive, for the years 1972, 1973, and 1974. (The average number of female employees during the three-year period was 506 and the average number of male employees was 1,189.) The incidence and costs of the claims were identified by sex and charged to twenty-eight (28) broad classifications of diagnosis and treatment embracing all of the claims filed. (See *Appendix I.*) Of these twenty-eight classifications, ten were sex oriented; eight for female (abor-

[1]The affidavit of Mr. Wells, Personnel Manager of Celanese Domestic Fibers Group, was submitted in support of defendant Celanese's Response to plaintiff Odom's Motion for Partial Summary Judgment.

tion, breast conditions, caesarean section, D & C, hysterectomy, gynecology, normal delivery and tubal litigation) and two for male (prostate conditions and vasectomy).

All claims for the same diagnosis and treatment (physician, hospital, drugs, etc.) were counted as one and all costs for the same diagnosis and treatment were totaled. During the three-year period, an emplo, ee could have submitted more than one claim and expenses for the same, or different, diagnosis and treatment.

This study established the following facts:

1. The total female medical costs for the three-year period amounted to $223,706, or $442 per female employee (which does not include 12 per cent "administrative charges").

The total male medical costs during the same period amounted to $229,228, or an average of $193 per employee (which does not include 12 per cent "administrative charges").

On a per employee basis, the medical costs for females were 129 per cent greater than for males.

2. Total claims paid to Celanese's employees at its Charlotte facilities during the three years amounted to $452,934. Among the male employees, 897 (approximately 75 per cent) filed 1,153 claims for a total dollar payout of $229,228, whereas 580 female employees (approximately 115 per cent) filed 917 claims and received $223,706.

The average cost per employee filing was $256 for males and $386 for females, or 50.8 per cent more for females than males.

The average cost per claim filed was $199 for males and $244 for females, or 22.6 per cent more for female claims than for male.

3. One hundred seventy-six (176) female employees (34.8 per cent of the total) received $73,296 in claims that were sex oriented. This amounts to $416 per female employee filing a claim and $145 per female employee in the Charlotte facility work force.

Thirty-seven (37) male employees (3.1 per cent of total) received 4,034 in claims that were sex oriented, This amounts to $109 per male employee filing a claim, and $3.40 per male employee in the Charlotte facility work force.

The costs for sex oriented medical treatments were forty-two (42) times greater per female employee than per male employee.

Sex-oriented claims for the female employees represented 16.2 per cent ($73,296 divided by $452,934) of all male and female claims paid for the three-year period in question, while sex oriented claims for males represented less than 1.0 per cent ($4,034 divided by $452,934) of the total claims paid. (See *Appendix II.*)

4. Claims paid in 1972, 1973 and 1974 for illnesses not sex oriented (i.e., diagnosis same for either sex) follow:

	Number of claims	Total Cost	Cost per employee
Male	1,116	$225,194	$189.39
Female	741	150,410	297.25

For the three-year period, non-sex oriented medical costs per employee were 56.9 per cent greater for females than for males. (See *Appendix III.*)

5. Medical costs, as a percentage of average salary base ($17,697,481 for males and $3,612,872 for females) for the three-year period equaled 6.2 per cent for females and 1.3 per cent for males, or a ratio of almost five to one.

6. There were 567 (47.7 per cent) active male employees on the payroll as of December 31, 1974 who had no medical claims for the preceding three years, and 191 (37.7 per cent) females with no claims for the same period.

7. Of the total amount of hospital/surgical/medical claims paid ($452,934) in the three-year period, female employees received 49.4 per cent of the total, although they represented only 29.8 per cent of the total average Charlotte facility work force.

8. From January 1, 1971, through August 30, 1974, Celanese paid out $193,756 at its Charlotte facilities in long-term disability (LTD) payments. Of this amount, females received $109,166 and contributed only $27,350, while males received $84,590 but contributed $157,408. In other words, male employees subsidized female LTD costs in the amount of $72,818 and Celanese paid the other $8,998.

9. The benefit costs for Celanese when comparing an average female and male employee at its Mecklenburg County facility who are both age 29, were employed on the same date and who both earn an annual salary of $8,050 are as follows (based upon actual

experience and/or actuarial pension cost estimates and/or life insurance company rate tables):

	Male	Female
Annual Pension Costs	$523	$ 692
Basic Life Insurance Costs ($15,000)	47	28
Av. Annual Sick Pay Received (1/1/71 to 8/16/74)	43	155
Av. Annual Medical Benefits Paid (1/1/71 to 7/1/74)	57	128
Stock Bonus & Investment Plan Costs (2% participation)	322	322
Annual "Benefit Costs" of above	$992	$1,325
Percent of "Benefit Costs" to Annual Salary	12.3%	16.5%

The number of claims and average amount of benefits paid under Celanese's sick leave plan to employees at its Charlotte facilities for the period January 1, 1971 to August 16, 1974 follows:

	Males			Females		
	No.	Average benefit per claim	Average benefit per employee	No.	Average benefit per claim	Average benefit per employee
1971	378	$200	$ 62	361	$188	$130
1972	376	271	84	359	181	131
1973	345	242	73	329	219	144
1974	280	258	63	279	155	92
			$282			$497

Thus, the costs of providing benefits to females under the sick leave plan exceeds the costs for males by 76.2 per cent.

Where under an employer's medical plan substantially higher medical payments are made per employee to women than to men, and where payments for treatment for purely female medical conditions are substantially higher per employee than payments for treament of purely male medical conditions, it cannot be sex discrimination for an employer, acting solely for economic reasons, to limit payments for one condition, maternity. It was not the intent of Congress, in enacting Title VII of the Civil Rights Act, to require employers to change the long-established policy of limiting such payments in medical plans and to impose upon them and the public the extraordinarily high costs entailed by such a change.

If there is any question with respect to the intent of Congress on a matter so far-reaching as this, the issue should be left to the Congress to determine.

CONCLUSION

The decision of the Court below should be reversed.

Respectfully submitted

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APPENDIX I

Employee Medical Claim Experience for 1972, 1973 & 1974

	MALE		FEMALE		Cost Per Male Employee (N = 1189)	Cost Per Female Employee (N = 506)
	No.	$	No.	$		
Abdominal Surgery	6	$ 6,488	10	$ 10,613	$ 5.45	$ 20.97
Abortion	0	—	6	1,306	—	2.58
Allergy	17	2,207	19	3,358	1.85	6.64
Breast	0	—	26	10,090	—	19.94
Caesarean Section	0	—	3	2,408	—	4.76
Cardio-Vascular	41	45,103	16	14,237	37.93	28.14
Diagnostic	227	9,151	163	10,279	7.70	20.31
D & C	0	—	19	6,515	—	12.88
Eye, Ear, Nose and Throat	45	7,768	13	2,568	6.53	5.08
Excisions and Incisions	131	5,691	84	6,880	4.79	13.60
Gastro-Intestinal	50	12,468	35	8,407	10.49	16.61
Hernia	16	12,710	5	4,476	10.69	8.85
Hysterectomy	0	—	22	27,313	—	53.98
Lung	20	12,373	7	3,379	10.41	6.68
Minor Injuries	114	3,579	42	1,755	3.01	3.46
Miscellaneous	44	27,027	26	14,335	22.73	28.33
Misc. (Gynecology)	0	—	47	3,810	—	7.53
Normal Delivery	0	—	35	13,844	—	27.36
Office Visits and Drugs	176	18,110	166	21,230	15.23	41.96
Orthopedic	138	36,346	91	24,857	30.57	49.12
Prostate	7	1,113	0	—	.94	—
Psychiatric	12	3,487	15	7,565	2.93	14.95
Rectal	26	5,791	16	6,277	4.87	12.41
Teeth	19	2,079	10	984	1.75	1.94
Tubal Ligation	0	—	18	8,010	—	15.83
Urology	32	13,827	21	7,532	11.63	14.89
Vasectomy	30	2,921	0	—	2.46	—
Varicose Veins	2	989	2	1,678	.83	3.32
Total	1,153	$229,228	917	$223,706	$192.79	$442.12

APPENDIX II

Cost Per Employee

Sex-Related Diagnosis	Male (N=1189)	Female (N=506)
Hysterectomy	$ —	$ 53.98
Normal Delivery	—	27.36
Breast	—	19.94
Tubal Ligation	—	15.83
D & C	—	12.88
Gynecology (Misc.)	—	7.53
Caesarean Section	—	4.76
Abortion	—	2.58
Vasectomy	2.46	—
Prostate	.94	—
	$ 3.40	$ 144.86
TOTAL COSTS	$4,034.00	$73,296.00

APPENDIX III

Cost Per Employee/Sex

	Non-Sex Related Diagnosis	Male (N=1189)	Female (N=506)
1.	Cardio-vascular	$ 37.93	$ 28.14
2.	Orthopedic	30.57	49.12*
3.	Misc.	22.73	28.33*
4.	Off. Visits & Drugs	15.23	41.96*
5.	Urology	11.63	14.89*
6.	Hernia	10.69	8.85
7.	Gastro-Intestinal	10.49	16.61*
8.	Lung	10.41	6.68
9.	Diagnostic	7.70	20.31*
10.	Eye, Ear, Nose & Throat	6.53	5.08
11.	Abdominal Surgery	5.45	20.97*
12.	Rectal	4.87	12.41*
13.	Excisions & Incisions	4.79	13.60*
14.	Minor Accidental Inj.	3.01	3.46*
15.	Psychiatric	2.93	14.95*
16.	Allergy	1.85	6.64*
17.	Teeth	1.75	1.94*
18.	Varicose Veins	0.83	3.32*
		$189.39	$297.26

*Females exceed males in "cost per employee" in 14 out of the 18 broad non-sex related categories.